IN THE

Supreme Court of the United States

October Term, 1964

No. 486

W. PALMER DIXON, JOAN DIXON, EVERETT W. CADY, CLARISSA H. CADY, J. HERBERT HIGGINS, MARION BLAIR HIGGINS, STEPHEN A. KOSHLAND, CAROL F. KOSHLAND, HENRY A. LOEB, JOHN L. LOEB, CARL M. LOEB, JR. and MARGARET L. KEMPNER, as Executors of the Last Will and Testament of CARL M. LOEB, SR., Deceased, HENRY A. LOEB, JOHN L. LOEB, CARL M. LOEB, JR., and ALAN H. KEMPNER, as Executors of the Last Will and Testament of ADELINE M. LOEB, Deceased, JOHN L. LOEB, FRANCES L. LOEB, HENRY A. LOEB, LOUISE S. LOEB, CLIFFORD W. MICHEL, BARBARA R. MICHEL, MARK J. MILLARD, CLAIRE MILLARD, HENRY PARISH, 2ND, DOROTHY PARISH, HUBERT R. A. SIMON, SAMUEL L. STEDMAN and GERDA C. STEDMAN,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

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W. Palmer Dixon, Joan Dixon, Everett W. Cady, Clarissa H. Cady, J. Herbert Higgins, Marion Blair Higgins, Stephen A. Koshland, Carol F. Koshland, Henry A. Loeb, John L. Loeb, Carl M. Loeb, Jr. and Margaret L. Kempner, as executors of the Last Will and Testament of Carl M. Loeb, Sr., Deceased, Henry A. Loeb, John L. Loeb, Carl M. Loeb, Jr., and Alan H. Kempner, as Executors of the Last Will and Testament of Adeline M. Loeb, Deceased, John L. Loeb, Frances L. Loeb, Henry A. Loeb, Louise S. Loeb, Clifford W. Michel, Barbara R. Michel, Mark J. Millard, Claire Millard, Henry Parish, 2nd, Dorothy Parish, Hubert R. A. Simon, Samuel L. Stedman and Gerda C. Stedman,

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The United States of America,

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REPLY BRIEF FOR PETITIONERS

I.

The Respondent in its brief expressly recognizes the direct conflict between the decision below and that of the Sixth Circuit in *Midland-Ross Corp.* v. *U. S.*, 214 F. Supp. 631, affirmed per curiam, 335 F. 2d 561 (C. A. 6th, 1964) and accordingly acquiesces in the granting of certiorari (Resp. 4). Yet, in portions of Respondent's brief (Resp. 6) there is the suggestion that the question before the Courts

below may be regarded as other than completely identical because in this case the Respondent accrued the original issue discount as ordinary income in the nature of interest and in *Midland-Ross Corp.* taxed the original issue discount as ordinary income in the nature of interest when realized on a sale. However, this cannot becloud the fact that the two cases are in direct conflict.

In *Midland-Ross Corp.* the taxpayer held securities identical to those here involved. The securities were sold prior to maturity. The original issue discount thus realized was reported by the taxpayer and upheld by the Sixth Circuit as capital gain. In this case, there likewise exists sales before maturity and a reporting by petitioners of the original issue discount thus realized as capital gain. This reporting was disallowed by the Courts below on the ground that original issue discount under the 1939 Code is when realized for tax purposes ordinary income in the nature of interest. The issue therefore is identical: Is original issue discount when realized ordinary income or capital gain under the 1939 Internal Revenue Code.

II.

The writ of certiorari should not be limited to Question I. The second issue raised as to the circumstances under which the Commissioner of Internal Revenue may retroactively apply a change of position despite reliance and detriment, is of very substantial importance in the administration of the federal tax laws.*

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* An example of the importance of the question and of the extent to which the federal courts are seeking guidance may be found in the recent decision in *Brecklein* v. *Bookwater,* 231 F. Supp. 404 (W. D. Mo., 1964). See also *Schuster* v. *Commissioner,* 312 F. 2d 311 (C. A. 9th, 1962); *Lesavoy Foundation* v. *Commissioner,* 238 F. 2d 589 (C. A. 3rd, 1956).

The Government contends (Resp. 11) that it is unnecessary to pass upon the taxpayer's claim of reliance because (a) the *Caulkins* case is distinguishable on its facts and (b) the Commissioner may always retroactively correct a mistake of law without regard to taxpayers reliance on his prior position.

This position is without merit and should not be the basis for a foreclosure of any review of the claim of reliance. First, the court below, in contrast to the Government's present position, recognized that the securities at issue in *Caulkins* were analogous to those involved in the present case (Pet. 6a). Second, the court below misinterpreted the holding of the Supreme Court in *Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180 (1957).

This Court in the *Automobile Club of Michigan* case allowed the change of position to be applied to the taxpayer there involved because the change was first made effective for a year in which taxpayer had been put on notice of the change by a publicly-issued General Counsel's Memorandum, and secondly, because the change of position was being uniformly applied to all taxpayers similarly situated.

Neither of these factors is present here. In 1952, petitioners had no reason to believe that a change of position was even under consideration. And the change of position was not applied uniformly to all taxpayers. Rev. Rul. 55-136, 1955-1 Cum. Bull. 213, does not apply the change of position retroactively against taxpayers where the securities at issue are Accumulative Installment Certificates purchased from the Investors Syndicate. There is thus no dealing with all taxpayers "upon the same basis" as was the case in *Automobile Club of Michigan*. It was upon this circumstance that this Court emphatically rested its approval of retroactive application of change of position, 353 U. S. at p. 186.

The Commissioner apparently believes that it may retroactively change his position in any case in non-uniform and thus discriminatory manner, and without giving the slightest notice of forthcoming change. Unless this Court grants review of the issue, the Commissioner will continue so to believe and taxpayers will remain unsettled as to the significance and reliability of the Commissioner's announced positions and therefore will continue to litigate such actions of the Commissioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be granted as to all questions.

November 9, 1964.

Respectfully submitted,

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